this deed of March 23, 1908, and claim to be, by virtue thereof, the owner of the land in controversy.

As already seen, there were no pleadings putting in issue the present belated contention of the appellant, and, without intending to approve as proper practice the method adopted for raising the question, it is sufficient to say that upon the whole case the appellant has failed to sustain the issue raised by its assertion of title to the land in controversy, and the decree appealed from must be affirmed.

Affirmed.

VIRGINIAN RY. CO. *v.* HURT *et al.*

SAME *v.* LINKOUS *et al.*

Sept. 14, 1911.

[72 S. E. 110.]

1. Damages (§ 112*)—Fires—Measure of Damages.—Where part of the owners of timber negligently fired by a railroad company were infants and incapable of selling their interest without the aid of a court of equity, the deterioration in timber after the injury up to the time the court of equity could act was a proper item of damage.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 281-283; Dec. Dig. § 112.*]

2. Railroads (§ 485*)—Fires—Instructions—Applicability to Evidence.—In an action for the burning of timber, there was evidence that, if the timber could be got off the land in a few months after the fire, the damage would be very little, but that, if it remained several years, it would be practically worthless. Some of the owners of the land were infants, who could not dispose of their timber without the aid of a court of equity. There was no evidence showing when a disposition of the timber could be made by the court. Held, that an instruction allowing the jury to consider the deterioration, if any, during a reasonable time for marketing the timber after the fire, was not applicable to the evidence, and was misleading.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 485.*]

3. Damages (§ 174*)—Fires—Evidence—Admissibility of Evidence.—In an action against a railroad for an injury to timber by fire, where there was evidence that, if the timber was taken off the land within a few months after the fire, the damage to it would have been very little, but that, if it was taken off with a small force, it would be damaged 50 per cent. or more, evidence of plaintiff that situated as he was it would take him from three to four years to

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

get the timber off the land, and that at the end of two years it would be worthless, was inadmissible, as the most that plaintiff could claim was the injury where the timber was removed within a reasonable time.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 462-467; Dec. Dig. § 174;* Railroads, Cent. Dig. § 1726.]

4. Damages (§ 112*)—Fires—Measure of Damages.—In an action for the negligent firing of timber, where all of the plaintiffs were sui juris, and the timber had a market value at the time of the fire, the measure of damages was the difference between the market value immediately before and immediately after the fire.

[Ed. Note.—For other cases, see Damages, Dec. Dig. § 112.*]

5. Evidence (§ 483*)—Opinion Evidence—Cause and Effect.—In an action for the negligent firing of timber by a railroad, opinion of a witness that the fire must have been communicated from one side of the railroad to the other was inadmissible.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2256-2266; Dec. Dig. § 483.*]

6. Evidence (§ 483*)—Opinion Evidence—Expert Testimony.—Expert testimony that, when a forest fire is out, sparks will blow long distances, is inadmissible; it being a matter of common knowledge.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2256-2226; Dec. Dig. § 483.*]

7. Railroads (§ 481*)—Fires—Evidence—Admissibility.—In an action for the negligent firing of timber, where it was material to show the direction and velocity of the wind on the day of the fire, testimony as to the direction of the wind at a period in the day after the fire was ignited, and testimony by a witness who was 20 or 30 miles distant as to the direction and velocity of the wind, was admissible.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1717-1729; Dec. Dig. § 481.*]

Error to Circuit Court, Montgomery County.

Action by Harriet A. Hurt and others, and action by J. L. Linkous and others, against the Virginian Railway Company. Judgment for plaintiffs in both cases, and defendant brings error. Reversed and remanded.

H. T. Hall and *G. A. Wingfield,* for plaintiff in error.
Longley & Jordan, for defendants in error.

BUCHANAN, J. These were actions of trespass on the case, instituted by the defendants in error to recover damages from the Virginian Railway Company for the destruction and injury

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

of standing trees and other property resulting from fire put out, as is alleged, by the defendant railway company's negligence.

The cases were heard together, and a verdict and judgment rendered in each against the railway company, writs of error were awarded to those judgments, and the cases were heard together in this court.

The first error assigned is to the action of the court in giving instruction No. 2 offered by the plaintiffs, and in refusing to give an instruction, also numbered 2, offered by the defendant, and in giving the latter instruction as modified by the court. The instructions, as offered, were in the following words:

Plaintiffs' Instruction No. 2:

"The court instructs the jury that the measure of damages to timber actually destroyed, if they believe from the evidence any was destroyed, is a fair cash value of such timber as it was at the place on the day it was destroyed; and the court instructs the jury that the measure of damages as to injured timber, if they believe any was injured, is the difference between such value of such timber before the fire and a fair cash value after the fire, taking into consideration the deterioration, if any, arising as a natural and probable result of said fire within a reasonable time for marketing the same."

Defendant's Instruction No. 2:

"The court instructs the jury that the burden is on the plaintiffs to show, by a preponderance of testimony, the amount of the damages claimed by them.

"In estimating the damages as to the timber alleged to have been injured or destroyed by the fire, the jury should find the difference between the value of the timber where it stood before the fire and the value of the timber after the fire; in other words, the damage suffered is the difference between the fair cash value of the timber as it stood immediately before the fire and its fair cash value as it stood immediately after the fire."

Both instructions, as offered, recognized the same rule for estimating damages for "timber destroyed," viz., its value at the time it was burned. The instructions differed as to the rule to be applied in ascertaining the damages to the timber injured. The rule as contended for by the defendant was that the true measure of damages for the injured timber was the difference in its value immediately before and immediately after the fire. On the other hand, the plaintiffs claimed, and the court so held, that the measure of damages for such timber was the difference between the value of such timber before the fire and its value after the fire, taking into consideration the deterioration, if any, arising as a natural and probable result of the fire within a reasonable time for marketing the same.

[1] As a general rule, the damages for negligently injuring

standing timber ought to be ascertained as of the date of the fire. See generally Woodenware Co. *v.* United States, 106 U. S. 432, 1 Sup. Ct. 498, 27 L. Ed. 230; Sedwick on Damages, § 933; notes to Bailey *v.* C., M. & St. Paul Ry. Co., 19 L. R. A. 653; notes to Ball *v.* Simms Lumber Co., 18 L. R. A. (N. S.) 244.

But the facts of the particular case may be such as to take it out of the general rule. Where, for instance, there is no market value for the injured timber as it stands, or the owners of it are infants and the timber cannot be disposed of promptly, then a different rule should apply.

In these cases the evidence tends to show that there was a market for the injured timber, and that it could readily have been disposed of; but, in the case of Hurt and others against the defendant, a number of the plaintiffs were infants, incapable either of selling their interest in the land or the injured timber without the aid of a court of equity. Such deterioration, if any, resulting from the fire as would naturally and probably take place during the time reasonably necessary to obtain the aid of a court of equity in making disposition of the injured timber, was a proper item to be considered in estimating the damages in that case, as clearly the defendant, and not the plaintiffs, should bear such loss.

[2, 3] There was evidence tending to show that, if the timber could have been gotten off the land in a few months after the fire, the damage to it would have been very little, but, if it had to be gotten off with a small force, it would be damaged 50 per cent. or more. One of the plaintiffs was permitted to testify, over the objection of the defendant, that situated as he was it would take him three or four years to get the injured timber off the land, and that at the end of two years much of it would be worthless. Upon such evidence, and in the absence of evidence as to the time within which a disposition of the timber could probably be made through the aid of a court of equity, how could the instructions given as to the injured timber aid the jury in coming to any just conclusion? If they estimated the damages to the injured timber at some period subsequent to the date of the fire, at what period under the evidence could they fix it—at the end of three months, when the evidence tended to show that there would be little deterioration, or at the end of two years, when the evidence tended to show that the damage would be as much as 50 per cent., or at the end of three or four years, the time which one of the plaintiffs testified it would require him to market it, and during which period much of the timber would become worthless?

The instructions given as to the injured timber were not applicable to the evidence before the jury, and could but have mis-

led them. Besides, the evidence of one of the plaintiffs upon which those instructions were in part based, that situated as he was it would take him three or four years to get the injured timber off the land and market it, was clearly inadmissible, and the court ought to have sustained the defendant's objection to it. The question was not what he could do in removing and marketing the timber, but the most the plaintiffs could claim under their own view of the law was what would be a reasonable time within which the timber could be marketed.

We are therefore of opinion that the instructions given as to the manner of ascertaining the damages did not correctly state the law upon the evidence before the jury, and that for that error, as well as in permitting one of the plaintiffs to testify as to the time it would take him to remove and market the timber situated as he was, the judgment of the court should be reversed.

[4] It follows from what has been said that the said instructions as to the method of ascertaining the damages to the injured timber in the Linkous case were also erroneous. In that case the plaintiffs were sui juris, and the evidence shows that the timber had a market value at the time of the fire. The measure of damages in that case was the difference between the market value of the injured timber immediately before the fire and its market value immediately after the fire.

[5] The plaintiffs asked one of their witnesses the following question, which she was permitted to answer over the defendant's objection:

"Q. You were asked how you knew that the fire was communicated from the northern side of the railroad to the south side. I will ask you if there was any other possible way for the fire to begin to burn from where you saw it? A. No, sir; I do not think that there was any other way."

This action of the court is assigned as error.

The court ought to have sustained the defendant's objection. The evidence sought and obtained was merely the opinion of the witness upon a subject where opinion evidence was clearly inadmissible. The action of the court, however, would furnish no sufficient ground for reversal as the circumstances under which the question was asked and answered show that no prejudice could have resulted to the defendant therefrom.

[6] Another error assigned is to the action of the court in permitting one of the plaintiffs' witnesses to testify that it is a common occurrence that, when fire is out, sparks or coals from it will when the wind is very high blow long distances from one high point to another. That this is so is a matter of common knowledge, doubtless as well known to the jurors as to the witness. Opinion evidence is not admissible touching such mat-

ters; but, if admitted, is generally mere harmless error. Va. Iron Coal & Coke Co. *v.* Tomlinson's Adm'r, 104 Va. 249, 51 S. E. 362

[7] Errors are assigned to the action of the court in permitting witnesses Stanger and Lane to testify as stated in bills of exceptions numbered 5 and 7, respectively. The object of the evidence of these witnesses was to show the direction and velocity of the wind on the day of the fire. While Stanger testified to the direction of the wind at a later period in the day than the testimony tends to show that the fire crossed from the lands on the north side of the defendant's road to the lands on the south side, and Lane testified as to the direction and the great velocity of the wind on that day when he was some twenty or thirty miles distant, the evidence tends, we think, to sustain the plaintiffs' contention as to the direction and velocity of the wind, material facts in the case, at the time the injury occurred, and was therefore admissible for what it was worth.

The remaining assignment of error is to the refusal of the court to set aside the verdict in the case of Linkous, etc., because contrary to the evidence. As the judgment will have to be reversed and the verdict set aside for the errors hereinbefore pointed out, and the causes remanded for new trials to be had in which the evidence may be different, it will serve no good purpose to consider that assignment of error.

In each case the judgment must be reversed, the verdict in each set aside, and the causes remanded for a new trial to be had not in conflict with the views expressed in this opinion.

Reversed.

WHEALTON & WISHERD *v.* DOUGHTY.

Sept. 14, 1911.

[72 S. E. 112.]

1. Navigable Waters (§ 36*)—Tide Lands—Ownership—"Guts."—Under Code 1904, § 1339, providing that the limits of lands lying on the shores of the sea, and the rights and privileges of the owners thereof, shall extend to low-tide mark, but no farther, the limits of marsh lying below high tide, to which the owner of the shore land is entitled, do not stop with a "gut" or channel which runs from a bay up across the marsh, in a direction more or less parallel with the shore, if such channel ebbs dry at ordinary low-water mark, but the

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.